No. 89-302

In The

Supreme Court of the United States

October Term, 1989

LINDA A. HAMPTON, *et. al.*,

Petitioners,

v.

TENNESSEE BOARD OF LAW EXAMINERS, *et. al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION

Are the members of the Tennessee Board of Law Examiners entitled to absolute judicial immunity with respect to the petitioners' constitutional claims regarding their failure of the Tennessee Bar Examination?

PARTIES TO THE PROCEEDINGS BELOW

The petitioners in this action are Linda A. Hampton and Rose O. Howard. The respondents in this action are the Tennessee Board of Law Examiners, jointly and severally, Catherine Darden, Wheeler Rosenbalm, Charles W. Burson, Valerius Sanford, Louis Hagood, Joseph Tipton, Michael Whittaker, Rodney B. Ahles, Scott McGinness, Prince Chambliss, Ellen Vergos, the School of Law of Memphis State University, Thomas Carpenter, Claude Coffman, Frances Sullivan, Daniel Wanat, Robert Banks, and Nancy Barron.

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The respondents, Tennessee Board of Law Examiners, *et al.*, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Tennessee Court of Appeals dated November 22, 1988. That opinion is reported at 770 S.W.2d 755 (Tenn. App. 1988).

STATEMENT OF THE CASE

The petitioners obtained juris doctorate degrees from the School of Law at Memphis State University and took the Tennessee Bar Examination in July of 1985 in order to gain admission to the Tennessee Bar. The petitioners

failed this examination and subsequently filed a petition for writ of certiorari with the Tennessee Supreme Court pursuant to Rule 7 of the Tennessee Supreme Court Rules. In particular, the petitioners sought (1) immediate admission to the Tennessee Bar despite failing grades on the essay portion of the bar exam, (2) modifications in the format and administration of the essay component of the examination on both constitutional and policy grounds, and (3) an award of money damages together with attorney's fees and costs. The petitioners also filed an addendum to the petition for writ of certiorari alleging that members of the Tennessee Board of Law Examiners had "intentionally discriminated and retaliated against them because of petitioners' utilization of the procedural due process provided in Tennessee Supreme Court Rule 7."

During the pendency of their petition before the Tennessee Supreme Court, the petitioners took the Tennessee Bar Examination in February in 1986 and again failed the examination. The Tennessee Supreme Court then denied the petition for writ of certiorari, and shortly thereafter the petitioners filed a complaint with the United States District Court for the Western District of Tennessee. This complaint was dismissed for lack of subject matter jurisdiction by order of the district court dated September 23, 1986. The petitioners filed a notice of appeal from this order on October 3, 1986, and the United States Court of Appeals for the Sixth Circuit affirmed the district court on May 22, 1987.

The petitioners next filed their complaint in this case with the Shelby County Circuit Court on October 3, 1986, essentially alleging that the defendants had "conspired" to ensure that the plaintiffs would fail the February 1986

bar examination. The petitioners alleged that the examiners responsible for administering the February 1986 examination memorized the plaintiffs' examination identification numbers to ensure that the plaintiffs would not be allowed to be a part of the "quota" of passing applicants. The petitioners did not describe in detail the "quota" they suspect exists, nor did they suggest a motive, or the exact nature, of the alleged conspiracy.

The petitioners alleged a violation of their due process and equal protection rights by virtue of their nonadmission to the Tennessee Bar, vis-a-vis the alleged "conspiracy" to ensure the plaintiffs' failure of the February and July 1986 bar examinations. The petitioners claim these actions gave rise to various causes of action against the defendants including: (1) violation of federal and state procedural due process, (2) violation of equal protection under 42 U.S.C. § 1983, (3) violation of Tennessee Supreme Court Rule 7, (4) fraudulent misrepresentation, (5) defamation, (6) outrageous conduct, and (7) intentional infliction of emotional distress.

The petitioners in their complaint requested the court to: (1) issue a preliminary and permanent injunction "enjoining the defendants from engaging in all acts, practices and policies which discriminate in intent or effect against plaintiffs under color of state law and deprivation of plaintiffs' right to procedural due process and equal protection under the law", (2) enter a declaratory judgment that the defendants have discriminated against the plaintiffs in violation of 42 U.S.C. §§ 1983 and 1985, (3) enter a judgment against the defendants for $150,000 in actual damages and $150,000 in punitive damages, and

(4) award the petitioners all costs and reasonable attorney's fees. The petitioners subsequently amended their complaint to increase their damages demand to $250,000 in actual damages and $250,000 in punitive damages.

The respondents filed a motion to dismiss and/or for summary judgment on November 6, 1986. The petitioners subsequently filed a cross motion for partial summary judgment and a motion commence discovery on or about December 8, 1987. On January 9, 1987, the trial court held a hearing on the plaintiffs' cross motion for partial summary judgment and the motion to commence discovery, and stayed all proceedings in the case pending final resolution of the complaint filed by the petitioners in the United States District Court of the Western District of Tennessee which raised the same issues as in the plaintiffs' case in the circuit court. Nevertheless, on January 22, 1987, the petitioners filed a motion to dispose of all pending motions, attaching an affidavit regarding certain conversations they allegedly had with a former law clerk of the Circuit Court Judge, who at the time was presiding over this action.

The complaint in federal court had been dismissed by the district court and was on appeal to the United States Court of Appeals for the Sixth Circuit where it was pending on January 9, 1987. The respondents filed a notice on June 18, 1987 that the United States Court of Appeals for the Sixth Circuit had affirmed the judgment of the district court in dismissing the plaintiffs' complaint and thus the stay on all proceedings was lifted. On June 19, 1987 during a hearing on the petitioners' various motions, the circuit court judge advised the parties that he was recusing himself because of the various allegations made

in the plaintiffs' affidavit. Shortly thereafter, another judge was appointed to sit by designation in this case.

A hearing was held on all motions on November 5, 1987, and the circuit court entered a memorandum opinion granting the respondents' motion for summary judgment upon all grounds. A judgment was entered to that effect on February 22, 1988. The petitioners filed a notice of appeal on March 4, 1988 to the Tennessee Court of Appeals. On November 22, 1988, the Tennessee Court of Appeals affirmed the order of the circuit court dismissing the plaintiffs' complaint although the court of appeals based its decision in some respects on reasons different from those of the circuit court. The petitioners then filed, on December 20, 1988, an application for permission to appeal to the Tennessee Supreme Court which was denied.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

Introduction

The petitioners raised a number of state and federal constitutional issues in the various courts below. However, the petitioners have limited their question before this Court to the single issue of whether members of the Tennessee Board of Law Examiners are entitled to absolute judicial immunity as to the petitioners' constitutional

claims regarding their failure of the Tennessee Bar Examination. Accordingly, the respondents limit their argument to that single issue.

II.

The Decision of the Tennessee Court of Appeals with Respect to the Applicability of Absolute Judicial Immunity to Members of the Tennessee Board of Law Examiners is in Accord with the Decisions of this Court.

There are two well established principles from which members of the Tennessee Board of Law Examiners derive absolute judicial immunity in this case. First, this Court has recognized absolute immunity for judges for all judicial acts committed within their jurisdiction. *Stumps v. Sparkman*, 435 U.S. 349, 357 (1978) (A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.); *Forrester v. White*, 108 S.Ct. 538, 543-45 (1988). Second, this Court has long recognized that courts have the inherent power to determine who should practice before them. In the case of *Ex Parte: Secumbe*, 60 U.S. 9, 13 (1856), Chief Justice Taney stated the following:

> It has been well settled, by the rules and practice of common law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what case he ought to be removed.

The Tennessee Court of Appeals applied these two principles to this case and recognized that the members

of the Tennessee Board of Law Examiners exercised judicial functions in their administration of the bar examination, and therefore, are entitled to absolute immunity in this case. *Hampton v. Tennessee Board of Law Examiners*, Tenn. Ct. App., pp. 9-15 (November 22, 1988) (appendix). This conclusion is based upon the fact that the Tennessee Supreme Court has specifically stated that the Tennessee Board of Law Examiners was created as an aid to the judiciary and thereby "became a part of the judicial branch of government." *Belmont v. Board of Law Examiners*, 511 S.W.2d 461, 463-464 (1974).

The Tennessee Board of Law Examiners consists of three members of the Tennessee Bar, who are appointed from time to time by the Tennessee Supreme Court and hold office as members of the Board at the discretion of the Tennessee Supreme Court. Tenn. Code. Ann. § 23-1-101(a). These members are compensated by the State of Tennessee pursuant to Tenn. Code Ann. § 23-1-101(b), and their duties include certification to the Tennessee Supreme Court of the names of all applicants who have passed the required bar examination pursuant to Tenn. Code Ann. § 23-1-104(a). However, the Tennessee Supreme Court retains full authority to determine if a person should be licensed and admitted to practice as an attorney under Tenn. Code Ann. § 23-1-104(b). Moreover, the Tennessee Supreme Court prescribes all rules to regulate the admission of persons to practice law and provides for a uniform system of examinations, which governs and controls admission to practice law pursuant to Tenn. Code Ann. § 23-1-103. Finally, the Tennessee Supreme Court possesses the original power to review the action of the Board in interpreting and applying its

rules. Tenn. Code Ann. § 23-1-103. *See also Belmont v. Board of Law Examiners,* 511 S.W.2d at 462.

The duties of the Tennessee Board of Law Examiners and its members are directly related to assisting the Tennessee Supreme Court in the admission of applicants to the Tennessee Bar. Thus, in carrying out these duties, the members of the Board perform judicial functions. *See In re Summers,* 325 U.S. 561, 565 n.6 (1945). Judicial immunity for members of the Tennessee Board of Law Examiners is justified by the overriding consideration of public policy to protect the judicial process of regulating admissions to the Tennessee Bar from harassment and intimidation by vexatious actions prosecuted by disgruntled applicants. *See Forrester v. White,* 108 S.Ct. at 543.* The petitioners argue that the "immunity doctrines were intended to protect persons who in good faith carry out their duties

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* In the *Forrester* decision, this Court was confronted with a personnel decision by a judge who demoted and then later discharged a probation officer under his supervision because of her sex. This Court indicated that the judge was not entitled to absolute judicial immunity because it was "clear that Judge White was acting in a administrative capacity when he demoted and discharged Forrester." *Forrester v. White,* 108 S.Ct. at 545. Unlike the *Forrester* decision, the members of the Tennessee Board of Law Examiners were acting in a judicial capacity in administering the Tennessee Bar Examination to the petitioners. Such an action is not an administrative but rather purely judicial function, delegated by the Tennessee Supreme Court to the Tennessee Board of Law Examiners which has been recognized by the Tennessee Supreme Court to be a part of the judicial branch of government in Tennessee. *Belmont v. Board of Law Examiners,* 511 S.W.2d at 463-464.

according to applicable rules and laws." Petitioner's Brief, p. 4. Such a contention is an incorrect statement with respect to absolute judicial immunity. If an act is a judicial one, it is entitled to absolute immunity irrespective of whether the act was in good faith and in accordance with applicable rules and laws. As long as the actions upon which the complaint is based are judicial, the members of the Tennessee Board of Law Examiners are entitled to absolute judicial immunity.

The petitioners complain that the members of the Tennessee Board of Law Examiners have failed to comply with provisions of Tennessee Supreme Court Rule 7 with regard to the administering of the Tennessee Bar Examination. However, even assuming those facts to be correct for purposes of the motion for summary judgment, the members of the Tennessee Board of Law Examiners are still entitled to absolute judicial immunity because the very acts complained of by the petitioners are judicial acts, and therefore, protected by such immunity. Accordingly, this Court should deny the petition for writ of certiorari.

III.

The Decisions of Other Federal Courts of Appeal are in Accord with the Decision of the Tennessee Court of Appeals

The petitioners cite no decisions of other state or federal appellate courts which conflict with the decision of the Tennessee Court of Appeals in this case. In fact, the decision of the United States Court of Appeals for the Sixth Circuit in the case of *Sparks v. Character and Fitness Committee*, 818 F.2d 541 (6th Cir. 1987), is in accord with

the decision of the Tennessee Court of Appeals in this case. The *Sparks* case involved a suit against the Kentucky Committee on Character and Fitness along with the Chief Justice of the Kentucky Supreme Court. The plaintiffs in that case alleged constitutional violations similar to those alleged in the present case connected with their failure to be admitted to the Kentucky Bar. Basically, the *Sparks* Court concluded that the actions of such a committee were judicial in nature as opposed to administrative as in the *Forrester* decision and, therefore, were protected by absolute judicial immunity.

The petitioners attempt to distinguish the *Sparks* case from the present case on the grounds that the Committee on Character and Fitness possessed discretionary authority with respect to their function; whereas, the Tennessee Board of Law Examiners does not possess such discretionary authority. Petitioner's Brief, pp. 6-7. Even if such a distinction were correct, which it is not, it has no relevance to the issue of whether or not the Tennessee Board of Law Examiners is performing a judicial function. As has been previously stated, this Court and the Tennessee Supreme Court have recognized that the admission of attorneys to the bar is a judicial function. *Ex Parte: Secumbe, supra; Belmont v. Board of Law Examiners, supra.* Furthermore, the Tennessee Supreme Court has explicitly delegated a portion of that judicial function which it possesses to the Tennessee Board of Law Examiners. Tenn. Code Ann. §§ 23-1-101 *at seq.* Therefore, in administering the Tennessee Bar Examination, the members of the Tennessee Board of Law Examiners are entitled to absolute judicial immunity.

CONCLUSION

Based upon the foregoing authorities and analyses, the respondents urge this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

LINDA A. HAMPTON AND
ROSE O. HOWARD,

Plaintiffs-Appellants,

Vs.

Shelby Law

TENNESEE BOARD OF LAW
EXAMINERS, jointly and severally,
Katherine Darden, Wheeler Rosenbalm,
Charles Burson, Valerius Sanford,
Lewis Hagood, Joseph Tipton,
Michael Whitaker, Rodney V. Ahles,
Scott McGinness, Prince
Chambliss, Ellen Vergos, other
unknown examiners, MEMPHIS
STATE UNIVERSITY'S CECIL C.
HUMPHREYS SCHOOL OF LAW,
Thomas Carpenter, Claude Kaufman,
Francis Sullivan, Daniel Wanat,
Robert Banks, Nance Barron,

Defendants-Appellees,

From the Circuit Court of Shelby County

Honorable William H. Inman, Judge by Designation

Linda A. Hampton, Pro Se, of Memphis
Rose O. Howard, Pro Se, of Memphis

W. J. Michael Cody
Attorney General and Reporter
William E. Young
Assistant Attorney General
For Appellees

AFFIRMED

Opinion filed: NOV 22 1988

CRAWFORD, J.

Concur:

HIGHERS, J.

FARMER, J.

Plaintiffs, Linda A. Hampton and Rose O. Howard, filed this suit in the Circuit Court of Shelby County against the defendants named in the caption seeking declaratory and injunctive relief and monetary damages. The complaint describes and identifies the parties as follows:

* * *

> 2. Plaintiffs, Linda A. Hampton and Rose O. Howard, are citizens of the United States and residents of Memphis, Shelby County in the State of Tennessee. Plaintiffs were examinees on the July 1985, February 1986 and July 1986 bar examinations.
>
> 3. Defendants are citizens of the United States and residents of the State of Tennessee. Defendant, Tennessee Board of Law Examiners, is the state investigatory agency which is responsible for the certification of applicants to the Tennessee Supreme Court for admission to the Tennessee State Bar. Defendant, Katherine Darden, is the Administrator of the Board. Defendant, Valerius Sanford, is the president of the Board. Defendant, Charles Burson, is vice-president of the Board. Defendant, Wheeler Rosenbalm, is former vice-president of the Board. Defendants, Michael Whitaker, Lewis Hagood, Joseph Tipton, Rodney Ahles, W. Scott McGuinness, Prince Chambliss, and Ellen Vergos, are assistant examiners with the Board. Defendant, Claude Kaufman, is Dean of the Cecil C. Humphreys School of Law. Defendant, Francis Sullivan, is former

Dean of the Cecil C. Humphreys School of Law. Defendant, Daniel Wanat, is former Dean of Cecil C. Humphreys School of Law. Defendant, Robert Banks, is a professor on staff at the law school. Defendant, Nancy Barron, is records secretary at the law school. Defendant, Thomas Carpenter, is president of the Memphis State University.

Plaintiffs allege as to the defendants, Board of Law Examiners, the individual members of the Board, and the adjunct examiners, as follows: That plaintiffs were failed by these defendants on the essay portion of the examinations, that the Board maintained no objective standards for determination of a passing of failing grade, and that in essence the competitive nature of the exam amounts to a fulfillment of quotas. They aver that they petitioned the Tennessee Supreme Court for writ of certiorari to seek review of the Board's action in denying them relief after the 1985 bar examination, and the proceeding was pending at the time they took the February, 1986 exam. They allege that in the taking of the subsequent examination, the defendants failed to accord them the anonymity provided by the rules of the Supreme Court and intentionally discriminated and retaliated against them. They aver that they were willfully and maliciously denied passing grades by the defendants.

As to Memphis State University and the individual defendants connected therewith, the complaint alleges that the defendant Board of Law Examiners conspired with the administration, faculty and staff of the school of law in determining who would be allowed to fill the "quota" of passing applicants, and further allege that the law school recommended that the Board should not pass

these plaintiffs on the examination. The complaint further avers that after plaintiffs failed the examination, they sought advice from defendant Wanat, then Dean of the law school, and that he, under the guise of helping them, attempted to steer them in the wrong direction in their efforts before the Board. They allege that defendant Banks, professor at the law school, while acting ostensibly as their friend and confidant, was in fact betraying their confidence to the Board and advising the Board against the best interest of plaintiffs. They allege that defendant Barron provided grade certification on behalf of the law school.

Plaintiffs further contend as to the defendant Board and the individuals connected therewith that they were denied procedural due process and that these defendants' acts were in violation of 42 U.S.C. §§ 1983, 1985. They further aver that the establishment of a quota denies their right to equal protection under the U.S. Constitution and that Tennessee Supreme Court Rule 7 was violated by the defendants.

The complaint further alleges that the defendants, Board of Law Examiners, and the individuals connected therewith, intentionally used policies and procedures designed to pass white applicants and fail black applicants and that this constituted outrageous conduct which caused plaintiffs to suffer severe emotional distress. Plaintiffs also allege that they were induced to retake the bar examination by misrepresentation of these defendants. They further aver that the individual defendants at Memphis State University fraudulently led them to

believe that they were competent to pass the bar examination upon graduation when they knew that the basis for a determination of passing was racially motivated.

Defendants responded to the complaint by Motion to Dismiss pursuant to Tenn.R.Civ.P. Rule 12.02 (1), lack of subject matter jurisdiction and Rule 12.02 (6), failure to state a claim upon which relief can be granted, or alternatively for summary judgment, pursuant to Rule 56, Tennessee Rules of Civil Procedure.

The judgment of the trial court dismissed plaintiffs' complaint for the reasons set out in the court's memorandum opinion which provides:

> The plaintiffs seek declaratory and injunctive relief, together with monetary damages, against the past and present members of the Board of Law Examiners, adjunct examiners, the Memphis State University Law School, and certain faculty members, to redress the asserted deprivation of their right to procedural due process and equal protection as guaranteed to them by the fourteenth amendment, and 42 USC 1983, 1985.
>
> The past and present members of the Board of Law Examiners move for summary judgment upon the ground of absolute judicial immunity. They insist that the Board is a surrogate of the Supreme Court of Tennessee, and that its members possess judicial immunity. This argument is well taken. See, *Belmont v. Board*, 511 SW2d 461 (1974).
>
> The defendant Memphis State University School of Law moves for summary judgment upon the ground of absolute immunity. This motion is well-taken; Memphis State is an arm of the

> State. The point is well-settled and beyond peradventure. *Applewhite v. M.S.U.*, 495 SW2d 190 (1973).
>
> The remaining defendants are granted immunity by TCA 9-8-307(h).
>
> In any event, as the State argues, if it may be said that the Act creating the Tennessee Claims Commission waived its immunity, (T.C.A. 9-8-307 et seq.) for wilful or malicious actions, the plaintiffs must seek redress before the Commission, and this Court is without subject matter jurisdiction.
>
> The Motion for Summary Judgment is sustained upon all grounds.

Plaintiffs' brief sets out ten issues for review but we perceive the only real issues to be:

> 1. Whether the trial court erred in dismissing plaintiffs' complaint as to all defendants, and
>
> 2. Whether the trial court erred in not ruling on plaintiffs' motions for discovery.

We will consider the second issue first.

On December 8, 1986, plaintiffs filed two motions, each styled, "Plaintiffs' Motion for Discovery." We quote them in the order in which they appear in the record:

> Comes now the Plaintiffs to move this court for discovery pursuant to Tennessee Supreme Court Rule 56.06 in order to further justify their opposition to the Defendants' Motion for Summary Judgment. In support of this motion Plaintiffs rely upon Argument IV of Plaintiffs' Response to defendants' Motion to Dismiss and/or for Summary Judgment to which this motion is attached and submitted affidavits.

* * *

> The aforenamed Plaintiffs move this court to grant discovery pursuant to Tennessee Rules of Civil Procedure 26 in order that they may prepare to try the factual issues in this cause.

The defendants' Motion to Dismiss or for Summary Judgment was filed November 6, 1986. We find nothing in the record to indicate that plaintiffs attempted to conduct any discovery procedure prior to the filing of the December 8, 1986 motion.

Discovery methods are established by Rule 26.01, Tennessee Rules of Civil Procedure, which provides:

> Discovery Methods. – Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; and physical and mental examinations; and, requests for admission.

Subsequent rules establish the procedure for utilizing the various discovery methods, all of which require direct proceedings between the parties, through their counsel if applicable, without the intervention of the court. Court intervention is contemplated under the rules only when a party does not comply with the rules regarding discovery. Rule 37, Tennessee Rules of Civil Procedure, is titled "Failure to Make or Cooperate in Discovery: Sanctions," and establishes the procedure for compelling discovery if the party has failed to comply with the rules.

As we previously noted in the case at bar, the record does not indicate that plaintiffs ever attempted to conduct discovery as provided by the rules nor is there any failure on the part of the defendants to comply with

established discovery procedures. Furthermore, the record does not reflect that plaintiffs ever attempted to bring before the court for a hearing their so-called "motions for discovery." Therefore, on the record before us, we cannot say that the trial court erred in not considering plaintiffs' motion for discovery.

We will now consider the first issue.

MEMPHIS STATE UNIVERSITY DEFENDANTS

Plaintiffs' complaint against Memphis State University's Cecil C. Humphreys School of Law seeks monetary damages for alleged conspiracy to prevent the plaintiffs from passing the bar examination ostensibly in violation of 42 U.S.C. §§ 1983, 1985 (3) (1982) which provide:

> § 1983. Civil action for deprivation of rights
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceedings for redress . . . .
>
> § 1985 (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act

> in furtherance or the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

The complaint also alleges that misrepresentations by this defendant led plaintiffs to believe that when they obtained a degree from the law school they were qualified to pass the bar examination.

Memphis State University is a state institution to which the doctrine of sovereign immunity applies. *Dunn v. W.F. Jameson & Sons, Inc.*, 569 S.W.2d 799 (Tenn. 1978); *Applewhite v. Memphis State University*, 495 S.W.2d 190 (Tenn. 1973). This defendant as an arm of the state is not a "person" under § 1983. *Kompara v. Board of Regents*, 548 F. Supp. 537 (M.D. Tenn. 1982). The trial court correctly dismissed the case as to Memphis State University's Cecil C. Humphreys School of Law.

From our review of the complaint as it pertains to the individual defendants at Memphis State University, we find no allegations against defendants, Thomas Carpenter and Francis Sullivan. The only allegation as to defendant Barron is that she "provided grade certification on behalf of the law school." There is no statement of claim upon which relief can be granted against these three defendants, and the plaintiffs' suit against them was properly dismissed.

The complaint as to the remaining individual defendants connected with Memphis State University, defendant Wanat and Defendant Banks, allege acts that could be considered to be acts in their individual capacities, and thus cognizable in this proceeding. The complaint alleges that defendant Wanat attempted to thwart plaintiffs' efforts before the Board of Law Examiners and that defendant Banks was apparently betraying their confidences in working with the Board instead of with them. These defendants, in support of their motion for dismissal or for summary judgment, filed affidavits which specifically refute each and every allegations [sic] made against them by the plaintiffs.

Summary judgment is to be rendered by a trial court only when it is shown that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn.R.Civ.P. 56.03. In ruling on a motion for summary judgment, the trial court and the Court of Appeals must consider the matter in the same manner as a motion for a directed verdict made at the close of the plaintiff's proof, i.e., all the evidence must be viewed in the light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent. It is only when there is no disputed issue of material fact that a summary judgment should be granted by the trial court and sustained by the Court of Appeals. *Graves v. Anchor Wire Corp.*, 692 S.W.2d 420 (Tenn. App. 1985); *Bennett v. Mid-South Terminals Corp.*, 660 S.W.2d 799 (Tenn. App. 1983).

The record reflects no countervailing evidence produced in opposition to these defendants' affidavits. In *Fowler v. Happy Goodman Family*, 575 S.W.2d 496 (Tenn.

1978), Justice Harbison, now Chief Justice of our Supreme Court, said:

> A motion for summary judgment goes to the merits of the litigation. One faced with such a motion may neither ignore it nor treat it lightly. As stated in Rule 56.03, T.R.C.P.:
>
> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

575 S.W.2d at 498.

Considering this record as a whole and giving every inference in favor of the plaintiff, we are of the opinion that as to the allegations against defendant Wanat and Banks, there is no genuine issue as to any material fact, and summary judgment for these defendants was properly granted by the trial court.

BOARD OF LAW EXAMINERS DEFENDANTS

Relying on the doctrine of judicial immunity, the trial court dismissed the complaint as to the defendants Board of Law Examiners, the individual members of the Board, and the individual assistants to the Board members. The allegations against these individual defendants concern the manner in which the rules of the Supreme Court pertaining to the bar examination were applied to these plaintiffs. Plaintiffs also allege that the individuals defamed plaintiffs by their publication that plaintiffs had

failed the bar examination, that these individual defendants are guilty of outrageous conduct and that they made false representation to the plaintiffs inducing them to take the examination.

The Supreme Court of Tennessee has the inherent power to prescribe and administer rules pertaining to admission of attorneys to the practice of law. *Belmont v. Board of Law Examiners*, 511 S.W.2d 461 (Tenn. 1974). By act of the legislature, now codified as T.C.A. § 23-1-101 (Supp. 1988), the State Board of Law Examiners was created as part of the judicial branch of government under the complete dominion and control of the Supreme Court.

In addition to its inherent power and authority to govern admission to the bar, the legislature specifically provided that: "The Supreme Court shall prescribe rules to regulate the admission of persons to practice law and providing for a uniform system of examinations, which shall govern and control admission to practice law, and to regulate such board in the performance of its duties." T.C.A. § 23-1-103 (1980). Under its power and authority the Supreme Court promulgated Rule 7 of the Rules of the Supreme Court which establishes a comprehensive system for admission to the Bar of Tennessee. Section 12.09 of Rule 7 specifically authorizes the Board, subject to the approval of the Court to appoint attorneys as assistants to the board to perform such duties as prescribed.

In *Sparks v. Character & fitness Committee*, 818 F.2d 541 (6th Cir. 1987), the Court had before it a suit by an unsuccessful applicant to the Kentucky Bar. Suit was filed

against the Kentucky Committee on character and fitness, its members, two other employees hired by the committee, one member of the Board of Bar Examiners and the Chief Justice of the Kentucky Supreme Court. The plaintiff's complaint alleged constitutional violations similar to those alleged in the case at bar, and also alleged actions for breach of contract, fraud and deceit. All of the allegations were connected with plaintiff's failure to be admitted to the Kentucky bar. The District Court dismissed plaintiff's complaint seeking monetary damages on the grounds of absolute judicial immunity or quasi-judicial immunity. The Sixth Circuit Court of Appeals first considered the action against the Chief Justice of the Kentucky Supreme court and stated:

> The power to determine who should practice before the courts has been aptly summarized by Chief Justice Taney:
>
> "And it has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."
>
> *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13, 15 L.Ed. 565 (1856). This power is not only exclusive, it is inherently judicial. *Simons v. Bellinger*, 643 F.2d 774, 780 (D.C. Cir. 1980). *Accord Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174, 1182 (D.Nev. 1980), *Galahad v. Weinshienk*, 555 F.Supp. 1201, 1204 (D.Colo. 1983). Moreover, in this case, the Kentucky Constitution charges the Kentucky Supreme Court with the duty to "govern admission to the bar and the discipline of members of the bar." Ky. Const. of 1891, § 116 (1976).

> The court's exercise of its inherent power to choose its officers is substantially determinative of the character and quality of our entire judicial system, state and federal. Our system of justice depends, in substantial measure, upon the service of competent and qualified attorneys. The decision whether to admit or deny an applicant admission to the bar, and thus to determine the composition and quality of the bar, affects both the quality of justice in our courts and the public's perception of that quality. The decision is therefore integral to the very essence of the judicial process.
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> * * *
>
> We hold that the action of considering an application for admission to the bar, particularly when that duty is imposed upon the judiciary by constitution, is a judicial act. When it is performed by a judge, he or she is entitled to absolute judicial immunity. Therefore, the district court was correct in dismissing the plaintiff's complaint against the Chief Justice of the Kentucky Supreme Court.

818 F.2d at 543.

The Court then considered the liability of the remaining defendants and noted that these individuals on the committee and the board of bar examiners were performing duties imposed upon them by the Kentucky Supreme Court and that they act under the direct supervision of the Kentucky Supreme Court. The Court then stated:

> The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers in whom the responsibility for the performance of such duties is lawfully delegated by the judiciary. Therefore, those who perform this duty on behalf of the judiciary are entitled to the

> same judicial immunity as would be enjoyed by judicial officers performing the same act.

818 F.2d at 544-45.

Sparks filed a petition for writ of certiorari in the United States Supreme Court which was granted. 108 S.Ct. 744 (1988) The judgment below was vacated and the case was remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of the decision of *Forrester v. White*, 108 S.Ct. 538 (1988).

Upon remand, the Sixth Circuit again considered the case on the Supreme Court's mandate, and on reconsideration held that the opinion in *Forrester* "is entirely distinguishable from this case and, therefore, does not require that we change our previous decision." No. 85-5629, slip op. at 1-2 (6th Cir. Oct. 18, 1988). The Court said:

> In *Forrester*, plaintiff brought a 42 U.S.C. § 1983 action against a state court judge, alleging that that she was demoted and later discharged from her position as a probation officer because of her sex, in violation of the Equal Protection Clause of the fourteenth amendment. Under Illinois law, the defendant judge had authority to hire and fire such officers at his discretion. The Supreme Court held that the judge was not protected from liability by absolute judicial immunity because it was "clear that Judge White was acting in an administrative capacity when he demoted and discharged Forrester." 98 L.Ed 2d at 566.

No. 85-5629, slip op. at 8.

The Sixth Circuit commented:

Thus, the Court in *Forrester* made clear that only "judicial acts" are protected by judicial immunity, and that administrative decisions, although "often crucial to the efficient operation of public institutions," such as the courts, are not protected by absolute immunity. 98 L.Ed. 2d at 566. . . .

In *Forrester*, Justice O'Connor explained that the analytical key "in attempting to draw the line" between functions for which judicial immunity attaches and those for which it does not is the determination whether the questioned activities are "truly judicial acts" or "acts that simply happen to have been done by judges." It is the *nature* of the function involved that determines whether an act is "truly" judicial. (Emphasis in original).

The question then is whether an "administrative" decision to hire or fire a court staff employee, action not essentially "judicial," as in *Forrester*, is the functional equivalent of the action of the justice in a state supreme court and their designees in considering the qualifications of an applicant for admission to the bar as in this case.

A careful examination of the *Forrester* (case) . . . reveals that the nature of the function involved in determining qualifications for admission to the bar on the one hand, and hiring and firing court staff personnel . . . on the other, are essentially different. The former is a judicial act, the latter . . . [is] not.

* * *

Finally, the power to determine eligibility for membership in the bar has historically been reposed exclusively in the courts. *See Ex parte Secombe, supra; Simons v. Bellinger, supra*. That is

not to say that "because a judge acts within the scope of his authority, such . . . decisions are brought within the court's 'jurisdiction' or converted into 'judicial acts' . . . ." *Forrester*, 98 L. Ed.2d at 567. Some functions performed by courts are so inherently related to the essential functioning of the courts as to be traditionally regarded as judicial acts. Determining the composition of the bar is just such an historic and traditional function. The establishment of criteria for determining the intellectual competence, academic preparedness, and moral fitness of persons who petition the court for the privilege of undertaking the confidential trust of serving the court as one of its professional officers has always been a function confined to the courts themselves. It has been universally thought that the courts are best equipped to understand the requirements for adequate representation of lay persons before the courts and to identify the qualifications of those who would undertake such representation as the courts' officers. That inherent expertise, and the exercise of the power to apply it in admitting and rejecting candidates to the practice of law, functions rooted in tradition and history, are arguably as fundamental to the sound functioning of the judiciary as is the task of resolving the disputes such officers present.

We return, then to the analytical key . . . in *Forrester* for . . . [determining] judicial immunity . . . : whether the function in question is a "truly judicial act[]" or an "act[] that simply happen[s] to have been done by judges." Whatever argument might be made about the inherently "judicial" character of the function of determining the membership of the bar, it is manifest that whether analyzed from the perspective of judicial precedent, judicial expertise, history and tradition, or the nature of the act

> itself, determining the composition of the bar is clearly not a function, like hiring and firing administrative, clerical, and other court personnel that is or ever had been performed by anyone in the private sector or in other branches of government, and "simply happen[s] to have been done by judges."

No. 85-5629, slip op. at 9-10, 12-13.

We approve the reasoning of the Court of Appeals for the Sixth Circuit in Sparks, and we find the position of the parties in that case not unlike the position of the parties in the case at bar. We previously noted that our Supreme Court has the inherent and statutory power to regulate the admission to the practice of law. The board of Law Examiners are appointed by our supreme court. T.C.A. § 23-1-101 (a) (Supp. 1988). The individual defendants are appointed by the Board under the direction of the Supreme Court to act as the board directs. Rule 7, § 12.09. Therefore, we hold that these defendants have absolute judicial immunity for the acts complained of, and plaintiffs' suit was properly dismissed.

Furthermore, we note other valid reasons for dismissal of plaintiffs' suit. Section 13.02 of Rule 7. Rules of the Supreme Court, allows aggrieved parties to file a petition for relief with the Board of Law Examiners. A review of the board's action on the petition is provided by Rule 7, § 14.01 which states:

> Petition for Review. - Any person aggrieved by an action by the Board may petition this Court for a review thereof, as under the common law writ of certiorari. On the grant of the writ, the Administrator shall certify and forward to the Court a complete record of the proceedings

> before the Board in that matter. Any such petition must be filed within 60 days after the action complained of.

In *Petition of Tennessee Bar Ass'n*, 539 S.W.2d 805 (Tenn. 1976), the Court, speaking through Justice Fones, said:

> The Supreme Court of Tennessee has original and exclusive jurisdiction to promulgate its own Rules. Its rule making authority embraces the admission and supervision of members of the Bar of the State of Tennessee.
>
> . . . No other court in Tennessee has jurisdiction to promulgate a Rule governing the licensing of attorneys, and no other Court in Tennessee has jurisdiction to review and change or void any Rule promulgated by this Court.

539 S.W.2d at 807.

In *Belmont v. Board of Law Examiners*, 511 S.W.2d 461 (Tenn. 1974), the Supreme Court speaking of its rule governing admission to the bar, said:

> . . . [t]his Court has the inherent power to prescribe and administer rule pertaining to the licensing and admission of attorneys and as a necessary corollary thereto, no other court in Tennessee can construe or determine the applicability of a rule used to implement that power. It results, therefore, if this Court has the inherent and original power to prescribe the rules, then this Court has the original power to review the action of the Board of Law Examiners in interpreting and applying them. (citations omitted).

511 S.W.2d at 462.

From the foregoing we conclude that the trial court had no subject matter jurisdiction of the claims for injunctive or monetary relief against the individual defendants connected with the Board of Law Examiners as they pertain to their actions in the application of the rules and procedures established for determining a passing or failing grade on the bar examination.

Plaintiffs also allege that they were defamed by the actions of these defendants in that the defendants published to the world that plaintiffs had failed the bar examination. However, it is conceded that the defendants did not publish the fact that the plaintiffs failed the examination, but merely did not include them in the list of those that passed the examination. In fact, plaintiffs did not pass the examinations; therefore, there was nothing untrue about the publication. For communications to be libelous, they must constitute a serious threat to plaintiffs' reputations and be factually false. *See Stone River Motors, Inc. v. Mid-South Publishing Co.*, 651 S.W.2d 713 (Tenn. App. 1983). We fail to see how the failure to pass the bar examination is a serious threat to someone's reputation, and conclude that in addition to the other valid defenses this allegation fails to state a claim upon which relief can be granted.

Plaintiffs also allege that the individual defendants were guilty of outrageous conduct causing them severe mental and emotional damage. Viewing the complaint as a whole, we find the allegations in this regard to be general and conclusive and there is absolutely no allegation concerning the conduct of the individual defendants

which caused the damages alleged by plaintiffs. In *Swallows v. Western Electric Co.*, 543 S.W.2d 581 (Tenn. 1976), the Supreme Court said:

> The Tennessee Rules of Civil Procedure, while simplifying and liberalizing pleading, do not relieve the plaintiff in a tort action of the burden of averring facts sufficient to show the existence of a duty owed by the defendant, a breach of the duty, and damages resulting therefrom. The complaint in this action is replete with conclusions couched in the language of *Medlin, supra*, but does not undertake to describe the substance and severity of the conduct of appellee's employees which allegedly amounted to harassment, nor the substance and severity of the conduct of Pinkerton in its investigations, nor the actions of Western Electric in attempting to discipline appellant. And, as was pointed out in *Medlin*, "it is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the [complaint]," *supra* 398 S.W.2d at page 275. This is so because the court has the burden of determining, in the first instance, whether appellees' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether the conduct is such as to be classed as "mere insults, indignities, threats, annoyances, petty oppression, or other trivialities," for which appellees would not be liable. *See* comments to § 46 of the *Restatement of Torts, Second*.

543 S.W.2d at 583.

Therefore, under the holding of *Swallows*, clearly plaintiffs do not state a cause of action for outrageous conduct.

Plaintiffs also allege that they were induced to take the examinations by virtue of false representations that there were standards of minimum competency for the passing of the essay questions. There are no allegations with particularity concerning the alleged misrepresentations or any identification of the defendants that made the alleged misrepresentations. These allegations must be made with particularity. Tenn.R.Civ. P. 9. Plaintiffs fail to state a claim upon which relief can be granted.

After a complete review of this record, we are of the opinion that the trial court reached the right result, although in some respects for reasons different from those of this Court. This court will affirm a judgment correct in result, but rendered upon different, incomplete or erroneous grounds. *Hopkins v. Hopkins*, 572 S.W.2d 639 (Tenn. 1978).

Therefore, the order of the trial court dismissing plaintiffs' complaint is affirmed, and costs of the appeal are assessed against the appellants.

/s/ Crawford
Crawford, J.

CONCUR:

/s/ Highers
HIGHERS, J.

/s/ Farmer
FARMER, J.

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

LINDA A. HAMPTON AND ROSE O. HOWARD, APPELLANTS VS. TENNESSEE BOARD OF LAW EXAMINERS, JOINTLY AND SEVERALLY, KATHERINE DARDEN, WHEELER ROSENBALM, CHARLES BURSON, VALERIUS SANFORD, LEWIS HAGOOD, JOSEPH TIPTON, MICHAEL WHITAKER, RODNEY V. AHLES, SCOTT McGINNESS, PRINCE CHAMBLISS, ELLEN VERGOS, OTHER UNKNOWN EXAMINERS, MEMPHIS STATE UNIVERSITY'S CECIL C. HUMPHREYS SCHOOL OF LAW, THOMAS CARPENTER, CLAUDE KAUFMAN, FRANCIS SULLIVAN, DANIEL WANAT, ROBERT BANKS, NANCY BARRON, APPELLEES	) SHELBY LAW)) NUMBER 49)) (Filed) FEB 27 1989)

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of Linda A. Hampton and Rose O. Howard is denied at cost of the appellants.

PER CURIAM